1965

The American Oil Company v. General Contracting Corp., A Utah Corporation; Federal Insurance Co., A Corporation; and United States Steel Corporation : Appellant's Brief

IN THE

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OF THE

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a Maryland Corporation,
Plaintiff and A

vs.

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a Utah corporation; F
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STATES STEEL COR
Jersey corporation,
Defendants

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Appeal from the
for
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IN THE

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THE AMERICAN OIL COMPANY,
a Maryland Corporation,
Plaintiff and Appellant,

vs.

GENERAL CONTRACTING CORP.,
a Utah corporation; FEDERAL INSURANCE CO., a corporation; and UNITED STATES STEEL CORPORATION, a New Jersey corporation,
Defendants and Respondents.

No. 10326

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by a supplier of materials which were ordered by and delivered to a subcontractor of the general contractor of a State Road Commission contract. Said supplier seeks to recover from the general contractor and its surety.

DISPOSITION IN LOWER COURT

After default judgment was entered in favor of plaintiff against the insolvent subcontractor, the case was heard by the trial court on cross motions for summary judgment. The court granted the motion of the general contractor and its surety, and plaintiff appeals.

STATEMENT OF FACTS

On October 4, 1961, the State Road Commission of Utah entered into a construction contract with the defendant-respondent, United States Steel Corporation, the general contractor, hereinafter referred to as, "U. S. Steel," for the construction of a bridge in Daggett County, Utah. U. S. Steel furnished the contract bond required by and provided in the usual form by the State Road Commission, which bond was issued by defendant-respondent, Federal Insurance Co., hereinafter referred to as the "Surety." Between December 11, 1961, and December 10, 1962 (R-33,34), plaintiff-appellant, The American Oil Company, hereinafter called "Plaintiff," supplied materials used on the project to the defendant General Contracting Corp., a subcontractor of U. S. Steel, hereinafter called the "Subcontractor."

The Subcontractor did not contest that it owed Plaintiff $3,773.00 and allowed default judgment to be entered against it for this amount (R-16). Effective as of May 14, 1963, the Utah Legislature amended Chapter 1 of Title 14, Utah Code Annotated 1953, by repealing sections 14-1-1 through 14-1-4 (hereinafter called the "old statute"), and added 14-1-5 through 14-1-9, Utah Code Annotated 1953, hereinafter called the "new statute." Both the old and the new statute deal with public contractors' bonds.

The contract and bond executed by U. S. Steel and its Surety were executed on October 4, 1961 before repeal of the old statute and enactment of the new.

Under the old statute no notice of any kind was required to be given to a general contractor by a materialman of a subcontractor (such as plaintiff) prior to filing suit, and the event controlling when suit upon the bond could be timely filed was "the completion and final settlement of the contract." The old statute contains a special statute of limitations requiring that suit on the bond "must be commenced within one year thereafter," (In other words, one year after "the completion and final settlement") Section 14-1-2, UCA 1953.

The only disputed fact in this case concerns when "the completion and final settlement" of the contract occurred. The Road Commission's agent advised Plaintiff by affidavit that this was May 21, 1963 (R-35, R-46). However, this is denied by U. S. Steel (Paragraph 5, R-26), which relies on a supplemental affidavit (R-44) signed by the same person employed by the Road Commission. A subsequent third affidavit (R-46) was filed by this same employee to further clarify the validity of the May 21, 1963 date. This dispute is immaterial under Plaintiff's contention that it is a third party beneficiary of the general contract.

Under the new statute, "Every suit instituted *on the aforesaid payment bond*" is subject to a special statute of limitations which specifies

> that no such suit shall be commenced after the expiration of one year from the date on which the claimant . . . furnished or supplied the last of the materials. (14-1-6, emphasis added.)

The next clause also provides that any claimant, such as plaintiff, that did not have a contractual relationship with

the general contractor

> shall not have a right of action *upon such payment bond* unless he has given written notice to such contractor within ninety days from the date on which such claimant . . . furnished or supplied the last of the material (14-1-6, emphasis added).

In other words, the new statute would have required Plaintiff to give U. S. Steel notice on or before March 9, 1963, (90 days after December 10, 1962), although the new statute did not become law until May 14, 1963; also, Plaintiff's suit would have to be filed more than five months sooner than under the old statute, or by December 9, 1963, instead of May 20, 1964. If U. S. Steel is correct that "the completion and final settlement" of the contract occurred prior to May 16, 1963, Plaintiff's *statutory* rights (as distinguished from contractual rights) under the old statute against the surety would be barred because Plaintiff commenced the instant proceedings by filing its complaint on May 15, 1964 (R-8-A, reverse). No prior written notice was ever given to U. S. Steel by plaintiff of its claim. Plaintiff's Complaint makes no reference to the new statute, but paragraph 9 of the Complaint (R-2) alleges that U. S. Steel and its Surety owe Plaintiff $3,773.00 pursuant to the contract and bond executed by U. S. Steel and its Surety with the State Road Commission. The bond, incorporated and made a part of the contract by reference, provides that U. S. Steel

> shall also pay or cause to be paid all claims of . . . any other person or persons who supply . . . any of the subcontractors of the principal (R-4, 5).

The trial court prepared and filed the following memorandum decision:

> The above-entitled matter came on regularly for hearing on the 20th day of January, 1965, at the hour of 9:00 o'clock, A.M. on plaintiff's motion for sum-

mary judgment and on defendants' motion for summary judgment.

The matter was argued and submitted and the Court being fully advised in the premises finds that defendants' motion for summary judgment should be granted for the following reasons:

1. That the plaintiff is not a proper party plaintiff;

2. That said action should have been filed in Daggett County; and

3. That said action was not filed within the time required by the statute.

Dated: January 23, 1965. (R-48)

POINT I

THE CONTRACTORS' BOND STATUTE IS NOT THE EXCLUSIVE REMEDY OF PLAINTIFF.

Neither the old statute nor the new statute constitute the exclusive remedy of an unpaid materialman in an action against a general contractor.

In paragraph 9 of the Complaint (R-2) as one of the grounds of its action against U. S. Steel, Plaintiff seeks to recover as a third party beneficiary under the construction contract between U. S. Steel and the State Road Commission. By the terms of the contract (R-4, R-5) U. S. Steel agreed to pay materialmen of subcontractors who had supplied materials to the project. Plaintiff was such a materialman, and it has a nonstatutory right based on contract to sue U. S. Steel for payment under the construction contract.

Plaintiff's contract action against U. S. Steel is separate and apart from any rights which plaintiff may have under the statute against the Surety.

Both the old and the new statutes provided remedies and rights for claimants upon the bond and against the surety only. These statutes require that a bond be furnished. Neither requires a contract. Both describe generally the type of bond and then go on to set forth the rights and remedies of laborers and materialmen in actions upon the bonds.

It is submitted that the Legislature was speaking of suits on bonds only; there is no provision respecting suits on construction contracts. An indication of the purpose and intent of the statutes is found in the Title to the new statute, Chapter 15, Laws of Utah, 1963, which also repealed the old:

> An Act to provide for the Bonding of Contractors for Public Buildings . . . and to Repeal Sections . . . Relating to Bonding Requirements on Public Contracts . . .

Pertinent language from the two statutes are quoted: In the old statute, Section 14-1-2, supra, the following phrases are used: "action . . on the bond," "only one action shall be brought upon said bond" and "forever barred from recovery upon such bond." In the new statute, Section 14-1-6, supra, the following appear: "shall have the right to sue on such payment bond," and "Every suit instituted on the aforesaid payment bond."

These statutes relate only to the requirement of furnishing bonds and rights and actions thereupon. They do not require construction contracts; and they provide no remedies or actions upon such contracts. They were enacted for the protection and benefit of obligees, creditors, and sureties and

not for the protection of contractors, as stated in *State v. Campbell Building Co.* (1938 Utah) 77 P. 2d 341, where the Court discussed the application of the old statute:

> It may aid in understanding to bear in mind that this statute deals only with actions against the surety. *Claims of creditors against the contractor are not affected by the statute. We opine such claims may be asserted at any time within the general statute of limitations.* It is only when it is sought to hold the surety – only when recovery is to be made under the bond – that the provisions of the statute come into play. The restrictions are two-fold: To give the obligee a priority to determine and protect any claim it may have, and to fix a one year limitation on the surety's liability to other creditors . . . *The statute is not for the benefit of the contractor but for the benefit of the obligee, creditors, and surety.* (Emphasis added)

POINT II

PLAINTIFF, AS A THIRD PARTY BENEFICIARY UNDER THE CONSTRUCTION CONTRACT, IS ENTITLED TO JUDGMENT AGAINST U. S. STEEL.

By the terms of the construction contract between the State Road Commission and U. S. Steel, the latter agreed to pay materialmen of subcontractors who had supplied materials on the project. The contract provides:

> WITNESSETH, That for and in consideration of payments, hereinafter mentioned, to be made by the Commission, the Contractor agrees to furnish all labor and equipment; to furnish and deliver all materials . . . in the construction of (1) Steel Arch Bridge.

The contract further provided:

> The said plans and specifications and the notice to contractors, instruction to bidders, the proposal, special provisions, and *contract bond*, are hereby made a part of this agreement as fully and to the same effect as if the same had been set forth at length herein. (Emphasis added, R-4).

U. S. Steel did provide a bond, R-5, which it executed as principal and this bond became a part of the contract by reference and its terms became the terms of the contract. It provided in part as follows:

> NOW THEREFORE, if the above bonded principal as contractor . . . shall also pay or cause to be paid all claims of subcontractors, laborers, mechanics, materialmen, ranchmen, farmers, merchants, and *any other person or persons who supply the principal or any of the subcontractors of the principal* with labor, work, material, ranch, or farm products. provisions. goods and supplies of any kind including tools, machinery, and equipment to the extent of their use and depreciation on this contract; and shall pay all just debts incurred therefor, in carrying on such work . . . then this obligation shall be null and void, otherwise it shall remain in full force and effect. (Emphasis added, R-5).

Construing the contract as a whole, U. S. Steel had specifically agreed to pay the claims of materialmen, including materialmen of subcontractors. Plaintiff was such a materialman, having supplied materials to Subcontractor. Aside from any rights which Plaintiff might have under the Contractor's Bond statutes, U. S. Steel is liable to the Plaintiff on the contract on ordinary principles of contract law.

Under the construction contract, Plaintiff, as a materialman, was a third party beneficiary (creditor beneficiary).

Corbin on Contracts, Vol. 4, Sections 779 – and 787. Utah has long recognized the doctrine and right of third party beneficiaries and has applied the doctrine in favor of laborers and materialmen. The principle was stated in *Brown v. Markland,* 16 Utah 360, 52 P. 597. There the plaintiff, a materialman, sued for materials furnished in connection with the operation of a mine. One Frailey had entered into a contract to sell the mine to defendant and by the terms thereof defendant was to assume and pay claims of materialmen. The contract did not state who the materialmen were. On appeal the Supreme Court affirmed in favor of the materialman and quoted from the earlier case of *Montgomery v. Spencer,* 15 Utah 495, 50 P. 623:

> . . . where a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon at the instance and in the name of the party to be benefitted. although the promise or contract was made without his knowledge, and without any consideration moving from him.

The doctrine has been approved and reaffirmed in later Utah cases. *Smith v. Bowman,* 32 Utah 33-39, 88 P. 687; *Blyth-Fargo Co. v. Free* (1915 Utah) 148 P. 427; *M. H. Walker Realty Co. v. American Surety Co.* (1922 Utah) 211 P. 998; and *DeLuxe Glass Co. v. Martin,* (1949 Utah) 208 P. 2d 1127.

See also Corbin on Contracts, Vol. 4, Sections 775 and 788. Section 779 J, pp. 60, 61 of the latter work contains a discussion of the relationship and rights of laborers and materialmen as affected by the federal contractors' bond statute, the Miller Act. 40 USCA Section 270. The following is quoted from that work:

> Those who supply labor and materials to such a subcontractor are creditor beneficiaries of the principal

> contractor's promise. As such beneficiaries, they are in a 'contractual relationship' with him just as clearly as if they had sold their labor and materials directly to him.
>
> The bond, in which the surety promises an owner that laborers and materialmen shall be paid, creates a 'contractual relationship' between them and the surety; and if the principal contractor promises either the owner or a subcontractor that they shall be paid, a similar 'contractual relationship' is created between them and the principal contractor.

The rights of a third party beneficiary under a contract are established once it is shown that the contract necessarily and directly benefits him. *DeLuxe Glass Company v. Martin*, supra. The intention of the parties to this construction contract were unmistakably clear. The provisions, quoted above, contain an express promise by U. S. Steel to the State Road Commission to pay materialmen including materialmen of subcontractors.

Plaintiff's action against U. S. Steel on the contract was timely filed because this cause was not necessarily based on either the old or the new statute. As stated in *State v. Campbell Building Co.*, (1938 Utah), 77 P. 2d 341, 344:

> The statute is not for the benefit of the contractor but for the benefit of the obligee, creditors, and surety.

Earlier in the same decision the court held (page 344):

> . . . this statute deals only with actions against the surety. Claims of creditors against the contractor are not affected by the statute. We opine such claims may be asserted at any time within the general statute of limitations.

This suit, founded upon the written contract was timely filed, and would fall within the general statute of limitations.

Section 78-12-23, UCA 1953. The court erred in holding that Plaintiff's action was not filed soon enough,

The only difference to Plaintiff if recovery for Plaintiff is awarded under the third party beneficiary contract doctrine, rather than under the Contractor's Bonds Statute, is that Plaintiff would not be entitled to statutory attorney fees under Section 14-1-4.

POINT III

THE COURT ERRED IN HOLDING THAT THE ACTION SHOULD HAVE BEEN FILED IN DAGGETT COUNTY.

In its Memorandum Decision, the Trial Court held that the action should have been filed in Daggett County (R-48). Plaintiff's suit was filed in the District Court of Salt Lake County. The old statute, Section 14-1-2, UCA 1953, in effect when suit was filed, provided in pertinent part: ". . . any person who has supplied labor or materials . . . may sue . . . in any court having jurisdiction in the County where the contract was to be performed, . . ." This is a venue requirement; it is not jurisdictional. 17 Am Jur and 295, Contractors' Bonds, Section 116.

The federal contractors' bonds statute, The Miller Act, 40 USCA Section 270 (b), contains a similar provision: ". . . every suit instituted under this section shall be brought in . . . the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ."

The Federal Courts have construed the above provision to be a venue requirement and not one of jurisdiction. See

Texas Construction Company vs. United States (1956) 236 F. 2d 138. In that case the appellants, contractors, contended that the district court which tried the case was without jurisdiction because the contract was performed in another district. In its opinion the court said:

> Both parties here concede that, upon proper motion, the defendant in a case brought in a district other than that in which the contract was to be performed could require a dismissal of the action as being in the wrong venue. Appellants also concede that if the Court holds this to be a venue statute rather than one affecting jurisdiction of the Court, then their failure to move by timely motion to attack the venue would be fatal to their cause here.

The trial court had overruled all pleas asserting lack of jurisdiction. The Circuit Court affirmed on the ground that the statute was a restriction only on venue rather than on the power of the court to entertain the suit. It also said:

> On this ground also we feel that the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue.

To the same effect see *U. S. for Use of Mitchell Bros. Truck Lines v. Jen-Mar Constr. Co.,* 223 F. Supp. 646, and *U. S. to Use of Bailey-Lewis-Williams of Fla. Inc. vs. Peter Kiewit Sons of Canada,* 195 F. Supp. 752, affirmed, 299 F 2d 930.

If defendants had wanted the case tried in Daggett County their remedy was to have moved for a change of venue by responsive pleading early in the proceeding. Section 78-13-8, UCA 1953. Having failed to do so they waived all right in this regard.

Of course under Plaintiff's third party beneficiary claim, Salt Lake County and not Daggett County, is the proper venue.

POINT IV

THE COURT ERRED IN HOLDING THAT THE PLAINTIFF WAS NOT A PROPER PARTY PLAINTIFF.

The trial court in its Memorandum Decision (R-48) held that the plaintiff was not a proper party plaintiff.

The old statute, Section 14-1-2, UCA 1953, provided: ". . . any person who has supplied labor or materials . . . *may* sue the contractor and his surety, for his own benefit, in the name of the obligee, . . ." This provision was permissive and not mandatory; was a procedural requirement, and was not jurisdictional. Failure to comply with the provision constituted no bar to plaintiff's suit.

A similar problem arose in the Utah case *Board of Education vs. Southern Surety Co.* (1930 Utah) 287 P. 332. There, a materialman who had supplied materials to a contractor on a public school building, brought suit against the contractor and the surety. The statute, a predecessor of the present statute, required that in all suits personal notice of the pendency of such suits shall be given to all known creditors and that notice by publication in a newspaper should be made for three successive weeks. There the defendants contended that the publication of the notice did not meet the above requirements. The Supreme Court held that the requirement was not jurisdictional, saying:

> Even if it should be conceded that the appellant is right in its contention that the notice was not published for the full period of time contemplated by the statute, it could not be heard to complain on that account. The giving of the notice is not jurisdictional. The court had jurisdiction of the subject-matter and of the parties served with process independent of the notice. No claim is made that there are any claims for material furnished in the construction of the school building other than that of Frank M. Allen Company. If there are any such claims they are, and at the time of the trial of this cause in the court below were, forever barred from enforcing such claims against the appellant, and therefore it can in no way be prejudiced because the notice was not published for a longer period of time.

The trial court erred in determining that the plaintiff was not a proper party plaintiff. Plaintiff was the real party in interest and the failure to sue in the name of the state constituted no prejudice whatever to defendants.

The new statute contains no such provision and under the third party contract doctrine has no possible application to this case, the trial judge's decision to the contrary (R-48), notwithstanding.

POINT V

THE COURT ERRED IN HOLDING THAT PLAINTIFF'S ACTION WAS NOT FILED WITHIN THE TIME REQUIRED BY THE STATUTE.

In addition to Plaintiff's rights against U. S. Steel on the construction contract, discussed under Point II, above, Plain-

tiff is entitled to judgment on the bond against both U. S. Steel and the Surety on the basis of the old statute, Section 14-1-2, UCA 1953, and the trial court erred in holding that Plaintiff's action was not filed within the time required by the statute.

As heretofore stated, Plaintiff was a materialman having furnished materials to Subcontractor on the construction project and as a materialman was entitled to sue on the bond. Plaintiff furnished the last materials on or before December 10, 1962, and the final settlement date of the contract was May 21, 1963. The old statute, then in force, provided that suit must be commenced within one year after the date of complete performance and final settlement of the contract.

Plaintiff's suit was filed on May 15, 1963, within one year of the settlement date and within the time limit set by the old statute.

Effective May 14, 1963, the old statute was repealed and the new statute enacted. The latter contained two significant procedural changes affecting suits upon contractors' bonds. The first required materialmen of subcontractors to give the general contractor 90 days written notice prior to suit; the second changed the limitation period for filing suits by requiring that suits be filed within one year from the date on which the last material was furnished.

Under the factual circumstances of this case, Plaintiff could not possibly have complied with the procedural requirements of the new statute. The 90-day period as applied to Plaintiff had already expired by the time the new statute was enacted. The changed limitation period for filing suit had shortened the time within which Plaintiff could file by five months.

The Contractors' Bonds statutes as they permit suits by materialmen are highly remedial, and must, in furtherance of justice, receive a liberal construction and application so as to accomplish their real objective and purpose. *Mellon v. Vondor-Horst Bros.*, 44 Utah 300, 140 P. 130. It would be a denial of justice to deny Plaintiff the right to recover under either the old or the new statute.

Plaintiff's rights on the bond arose under the old statute which was law when the construction contract was executed and when Plaintiff delivered the last materials. These rights had accrued and should not be affected by repeal of the statute.

> The claim of the plaintiff below for half pilotage fee, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. *Pacific M.S.S. Co. v. Jollife*, 2 Wall 450.

In *Chism v. Phelps* (1958 Ark.) 311 S. W. 2d 297, the Arkansas Supreme Court had before it a personal injury action involving the effect of repeal of a comparative negligence statute. The Court said:

> As the New Hampshire court stated in the case of *In re Opinion of the Justices, supra* (89 N.H. 563, 198 A. 250); The repeal of a statute renders it thenceforth inoperative, but it does not undo or set aside the consequences of its operation while in force, unless such a result is directed by express language or

> necessary implication. A status established in a manner which becomes proscribed is not lost by the mere fact of the proscription.
>
> Even as here, where no question of vested rights is involved, the presumption is that the repeal of an act does not invalidate the accrued results of its operative tenure. To undo such results by a repeal is to give it retroactivity, and based upon elemental principals of justice a rule of construction avoids that effect if the language of the repeal does not clearly require it.

The same reasoning applies to the instant case. Plaintiff should be allowed to recover against U. S. Steel and its surety under the old statute.

CONCLUSION

The judgment of the trial court should be reversed and judgment be entered in favor of plaintiff against U. S. Steel because the trial court failed to recognize Plaintiff's contractual rights as a third party beneficiary of the construction contract. Plaintiff should also be entitled to recover under the Contractors' Bond statute from both U. S. Steel and Federal Insurance Co., its surety, because it would be a denial of justice to deny Plaintiff the right to recover under the facts of this case. The trial Court was in error in holding (1) that Plaintiff is not a proper party plaintiff; (2) that said action should have been filed in Daggett County; and (3) that said action was not filed within the time required by the statute.

Respectfully submitted,

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